Supreme Court, U.S.
FILED

No. 94-1935

MAY 25 1995
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

JOSEPH EUGENE WELCH and LARRY CECIL WELCH AS ALLEGED CHILDREN OF CECIL S. WELCH AND ELWYN GLORE WELCH,

Petitioners,

v.

MACK WREN WELCH AS ADMINISTRATOR OF THE ESTATE OF CECIL S. WELCH; CHARLES A. WELCH, MARION COCHRAN A/K/A MARION WELCH COCHRAN AND MARTHA RAY SINGLETARY AS CO-ADMINISTRATORS OF THE ESTATE OF ELWYN GLORE WELCH, and TOMMY WELCH,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

PETITION FOR CERTIORARI

MICHAEL WEINSTOCK
Suite 300
3405 Piedmont Road, N.E.
Atlanta, Georgia 30305
(404) 231-3999

Counsel of Record for Petitioners

May 24, 1995

Of Counsel:

Robert P. McFarland
252 Atlanta Road
Cumming, Georgia 30130
(404) 889-2522

Attorney for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a classification under Georgia law which prohibits a virtual adoption for the sole reason that the natural parents' rights have been terminated and Georgia Law refuses to apply the doctrine of *In Loco Parentis* to allow a juvenile to complete an agreement of adoption with the adoptive parents violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution?

PARTIES TO THE PROCEEDINGS BELOW

The plaintiffs in the Superior Court of Forsyth County were Joseph Eugene Welch, Jerry Cecil Welch, Larry Cecil Welch and Jenny R. Pressel. Only Joseph Eugene Welch and Larry Cecil Welch filed an appeal to the Georgia Supreme Court. Since the original filing of the complaint in the Superior Court it has been determined that the legal name of Joseph Eugene Welch is Joseph Eugene Sidler and the legal name of Larry Cecil Welch is Larry Joe Pennington.

The defendants in the Superior Court and the appellees in the Georgia Supreme Court were Mack Wren Welch as Administrator of the Estate of Cecil S. Welch; Charles A. Welch, Marion Cochran a/k/a Marion Welch Cochran and Martha Ray Singletary as Co-Administrators of the Estate of Elwyn Glore Welch, and Tommy Welch.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

JURISDICTION 1

OPINIONS BELOW 1

CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

I. Course of Proceedings and Dispositions Below 2

II. Facts 3

REASONS FOR ALLOWING THE WRIT OF CERTIORARI 6

I. In Loco Parentis 7

II. This Classification Discriminates Against Children With No Parents 13

CONCLUSION 20

APPENDIX ..... App. I - IV

TABLE OF AUTHORITIES

Page

CASES:

Benefield v. Faulkner, 248 Ala. 615, 29 So.2d 1 (1947) 11

Brinkerlioff v. Merselis, 24 N.J.L. 683 10

Brown v. Board of Education, 347 U.S. 483, 98 L.Ed. 873, 74 S.Ct. 686, 38 A.L.R. 2d 1180, Supp. Op. 349 U.S. 294, 99 L.Ed. 1083, 75 S.Ct. 753 (1954) 19

Cheney v. Coffey, 131 Tex. 212, 113 S.W.2d 162 (1938) 11

Clark v. Jeter, 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988) 17

Cleghorn v. Janes, 68 Ga. 87 (1881) 12

Crawford v. Wilson, 139 Ga. 654 (78 S.E. 30) (1913) 8

Criswell v. Jones, 60 Ga. App. 81, (5) 3 S.E.2d 115 (1939) 12, 13, 14

Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73, 20 L.Ed.2d 441, 88 S.Ct. 1515, reh. den. 393 U.S. 898, 21 L.Ed.2d 185, 89 S.Ct. 66 (1968) 16

Gomez v. Perez, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973) 17

Hilt v. Hooper, 203 S.W.2d 334 (Tex. Civ. App. Galveston 1947) 11

Howard v. United States, D.C. Ky., 2 F.2d 170, 174 10

Levy v. Louisiana, 391 U.S. 68, 20 L.Ed.2d 436, 88 S.Ct. 1509, reh. den. 393 U.S. 898, 21 L.Ed.2d 185, 89 S.Ct. 65 (1968) 15, 16

Malone v. Dixon, 410 S.W.2d 278 (Tex. Civ. App. Eastland 1966, writ ref., n.r.e.) 10

TABLE OF AUTHORITIES – Continued

Page

Meisner v. United States, D.C. Mo., 295 F. 866, 868 10

Nationwide Mutual Fire Ins. Co. v. Tomlin, 181 Ga. App. 413 (1986) 10

O'Neal v. Wilkes, 263 Ga. 850, 439 S.E.2d 490 (1994) 6, 8, 14

Rodriguez v. Morris, 136 Misc. 2d 103, 519 N.Y.S.2d 451 (1987) 11

Ruenbuhl v. Holland, 250 S.W.2d 455 (1952, Tex. Civ. App.) 11

Thompson v. Moseley, 344 Mo. 240, 125 S.W.2d 860 8

Trimble v. Gordon, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977) 18

United States v. Clark, 445 U.S. 23, 63 L.Ed.2d 171, 100 S.Ct. 895 (1980) 16

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175, 92 S.Ct. 1400, 1406, 31 L.Ed.2d 768 (1972) 17

Welch v. Welch, 212 Ga. App. 667, ___ S.E.2d ___ (1994) 1, 3

Wetherby v. Dixon, 19 Ves. 412 10

Yellow Cab Co. v. Industrial Com., 42 Ill. 2d 226, 247 N.E.2d 601 (1969) 14

CONSTITUTIONAL PROVISIONS:

Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States of America (1868) .... *passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

Bailey, *Adoption "By Estoppel,"* 36 Tex. L. Rev. 30, 32 8

George A. Locke, J.D., *Modern Status of Law As To Equitable Adoption Or Adoption By Estoppel*, 97 A.L.R. 3d 347 10

Irwin J. Schiffres, J.D., *Discrimination On Basis Of Illegitimacy As Denial Of Constitutional Rights*, 38 A.L.R. 3d 613, § 1 (1994) 15

Jay M. Zitter, J.D., *Race As Factor In Adoption Proceedings*, 34 A.L.R. 4th 167 (1994) 19

Re *Clark's Estate*, 105 Mont. 401, 74 P.2d 401, 114 A.L.R. 496 8

Re *Estate of Shirk*, 186 Kan. 311, 350 P.2d 1 8

Rights of Illegitimates Under Federal Statutes, 76 Harv. L. Rev. 337 (1962) 13

JURISDICTION

The order sought to be reviewed was entered by the Superior Court Of Forsyth County, Georgia, on or about May 21, 1993. On February 13, 1995, the Supreme Court of Georgia affirmed that order. On March 3, 1995, the Supreme Court of Georgia denied Petitioners' Motion for Reconsideration. This Court has jurisdiction under 28 U.S.C. Section 1257. Jurisdiction is proper under Rule 10(b) in that the state court of last resort has decided a federal question in a way that conflicts with the decisions of every other state court of last resort.

OPINIONS BELOW

The judgment appealed from is *Welch et al. v. Welch et al.* (and vice versa), Case Numbers S94A1722, S94X1725, S94X1728, S94X1730, S94X1732, all from the Supreme Court of the State of Georgia (2/13/95) (4-3) (App. I). The trial court's Order and Judgment was entered by the Superior Court of Forsyth County, Georgia, on May 21, 1993. (App. II)

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

Amendment XIV (1868)

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. Course of Proceedings and Dispositions Below

On July 2, 1992, Joseph Eugene Welch and Larry Cecil Welch (the "Petitioners") along with their "brother and sister"[1] who did not appeal, were parties to a Petition for Injunctive Relief and for Declaratory Judgment in the Superior Court of Forsyth County (92-21,934). Various hearings were held by the trial court and finally this action was combined with a Complaint for Trespass and Conversion by Charles A. Welch and Marion (Tina) Welch Cochran (92-23,103).

After appointment of administrators for each of the estates, realignment of certain parties, and consolidating of the two actions, the court set the matter down for a bench trial. The central issue of the trial was whether the Petitioners could prove their claim of virtual adoption. After two days of testimony, the Petitioners rested and the court entertained various motions from the four defendants (the "Respondents"). The trial court then found as a matter of fact that "there was clear, convincing

[1] Jerry Cecil Welch and Jenny R. Pressel were natural grandchildren of Elwyn Welch. Mrs. Welch raised these children after the death of their natural mother.

and strong evidence of the existence of an adoption contract between the juvenile court and the Welches." Yet, the court denied the claim of the Petitioners as a matter of law because "there is no case in Georgia which suggests that a virtual adoption can be based on an agreement between a juvenile court and the alleged adoptive parents."

This decision was appealed to the Supreme Court of Georgia. Before the appeal was docketed in the Supreme Court, the trial court dismissed the appeal for a failure to timely file the transcript. The Petitioners appealed this decision to the Court of Appeals of Georgia and obtained a reversal of this dismissal on March 17, 1994. *Welch v. Welch*, 212 Ga. App. 667, ___ S.E.2d ___, (1994). The case was finally docketed and heard by the Georgia Supreme Court in 1994. The case was decided against the Petitioners by a 4-3 vote on February 13, 1995 (App. I). The Motion for Reconsideration was likewise denied by the same vote on March 3, 1995 (App. II).

II. Facts

The Petitioners were denied their claim of virtual adoption to the estates of the only parents they ever knew, Cecil and Elwyn Welch. Mrs. Welch died on April 10, 1992. Shortly thereafter all of the other heirs[2] of Cecil and Elwyn Welch attempted to obtain her property. Mr. Welch was incapacitated and unable to make a will at his

---

[2] Mack Wren Welch is a brother of Mr. Welch. Charles A. Welch, Marion Cochran, Martha Ray Singletary, and Tommy Welch are grandchildren of Mrs. Welch by her deceased son of a prior marriage.

death. After both of the civil actions had been filed in the Forsyth Superior Court, Mr. Welch died intestate.

These other heirs knew well that Mr. and Mrs. Welch had always thought that they had adopted the Petitioners because of the "adoption papers" they received from the Juvenile Court of Richmond County at the time they were placed in the Welch home by the court. Mr. and Mrs Welch told the Petitioners all of their lives that these custody orders (App IV, V, & VI)[3] were their "adoption papers". The juvenile court orders specifically provided that the natural parents' rights had been terminated by the court and that the Welches were given the right to petition the Superior Court of the county of residence of the children to legally adopt them and to change their names to that of Welch in order that they might inherit any, or all, of their estates. According to the orders, the Juvenile Court of Richmond County obtained the right to stand *In Loco Parentis* for the natural parents in that the Superior Court of Richmond County, Georgia, which is a major court to the Juvenile Court, divested the natural parents of all parental rights and did give the full custody to the Juvenile Court.

The decision by the Superior Court of Forsyth County (App. III) articulated in detail that the trial court found as a matter of fact " . . . that there is clear, convincing and strong evidence of the existence of an adoption contract between the juvenile court and the Welches." The trial court held that this contract satisfies

---

[3] Larry Welch's orders were dated January 16, 1964, and Joey Welch's order was dated September 2, 1965.

the burden of proof required in virtual adoption cases. Yet, the court denied the claim as a matter of law because " . . . there is no case in Georgia which suggests that a virtual adoption can be based on an agreement between a juvenile court and the alleged adoptive parents." The court stated that if there is such a case or if the appellate courts should issue such authority, then the court " . . . would be persuaded that there was clear, convincing and strong evidence of the existence of such contract."

In the absence of any Georgia authority, the Petitioners argued case law from other states (listed below) that unanimously upheld the doctrine of virtual adoption by some person or institution standing *In Loco Parentis* for the child. The clear implication of this argument was that if Georgia did not recognize what all other states have recognized for years, then the Petitioners' equal protection rights would be violated in Georgia.

On February 13, 1995, the Supreme Court of Georgia rendered its decision on the main appeal and affirmed the trial court's dismissal of the Petitioners' claim for virtual adoption on the basis that as a matter of law, the Juvenile Court of Richmond County, Georgia did not have authority to become a party to a contract for adoption on behalf of the Petitioners. Oral arguments in the Supreme Court of Georgia were on November 7, 1994, and only six justices were present. The argument of counsel that day was similar to the arguments at the time of the motion in the superior court with the citation of case law in other states.

The chief justice was not present for oral arguments. Of those justices present, three would join in the majority

opinion and three would dissent. When the case was decided, the absent chief justice cast the deciding vote. The majority opinion relied on only one case, *O'Neal v. Wilkes*, 263 Ga. 850, 439 S.E.2d 490 (1994), in which two of the justices who dissented in this case, likewise dissented in *O'Neal*. The majority opinion never distinguished any of the decisions of other states which were cited by the Petitioners. The motion for reconsideration was likewise denied (4-3) with no opinion listed. That motion argued that the Petitioners were denied the equal protection of the law under the United States Constitution.

REASONS FOR ALLOWING THE WRIT OF CERTIORARI

The Superior Court of Forsyth County and the Georgia Supreme Court denied the Petitioners the equal protection of the law by ruling that they could not be virtually adopted solely on the basis that a juvenile court in Georgia has no authority to stand *In Loco Parentis* for natural parents and contract with the adoptive parents. On the other hand, natural parents whose parental rights have not been terminated can make an adoption contract for the child.

This petition for certiorari presents an issue of first impression to the Supreme Court of the United States under the Equal Protection Clause of the Fourteenth Amendment. To Petitioners' knowledge, there has never been a case in which a state court denied virtual adoption based on the fact that there was no natural parent to contract with an adoptive parent. The majority of the

states[4] recognize the equitable rule of virtual adoption and none of them have ever drawn a distinction between a natural parent and the person or institution that stands in the place of the natural parent. Yet, in a case of first impression, the Georgia Supreme Court (4-3) has drawn an unconstitutional distinction between the rights of a child with natural parents and one with no natural parents.

The Supreme Court of the United States has repeatedly held that classifications of children which invidiously discriminate on the basis of the failure to have legal parents are subject to heightened scrutiny. This issue has important public policy ramifications due to the fact that federal courts generally follow the definition of the state in which the case was presented in determining what is a "child" within the federal law in question.

I. In Loco Parentis

In an effort to prevent the unfairness of a situation such as faced by the Petitioners, the Supreme Court of Georgia as well as the highest courts of most other states have come to recognize the doctrine of equitable adoption. This equitable right is also known as virtual adoption, de facto adoption, adoption by estoppel, or specific performance of a contract to adopt. These courts have

---

[4] Virtual Adoption is recognized in the following states: AL, AK, AZ, CA, CO, DC, DE, FL, GA, IL, IA, LA, MD, MI, MN, MO, NE, NV, NC, ND, NJ, NM, NY, OH, OK, OR, PA, SC, SD, TN, TX, UT, VA and WV. Virtual Adoption is either not recognized or there is no reported case in the following states: AR, CN, IN, MS, MT, VT and WI.

held that if an individual who is legally competent to adopt another person as his child enters into a valid and binding contract to do so, and if such contract is not fully performed by the promisor during his or her lifetime, it may be enforced in equity against his estate. Re *Estate of Shirk*, 186 Kan. 311, 350 P.2d 1; Re *Clark's Estate*, 105 Mont. 401, 74 P.2d 401, 114 A.L.R. 496.

In a typical equitable adoption case, the foster parent or parents agree in substance with one or both of the natural parents or with someone standing *In Loco Parentis* to undertake a statutory adoption, thereby securing custody of the child. The child is then taken into the foster parents' home and is treated as a natural child. Several years thereafter, the foster parents die intestate without having perfected the adoption, and the child claims the inheritance rights accorded under the law to an adopted child. Bailey, *Adoption "By Estoppel,"* 36 Tex. L. Rev. 30, 32.

The basis of the equitable adoption principle is that it would be inequitable and unjust to a child if its foster parent or his privies were allowed to disregard and escape from the obligations of an adoptive parent due to their failure to comply with an adoption agreement made with the child's natural parent or custodian. *Thompson v. Moseley*, 344 Mo. 240, 125 S.W.2d 860.

The Georgia Supreme Court has recognized virtual adoption since the turn of the century. *Crawford v. Wilson*, 139 Ga. 654 (78 S.E. 30) (1913). *Crawford* was cited by Justice Sears in her strong dissent (joined by Justice Hunstein) in *O'Neal, supra*. Justice Sears was concerned with violation of civil rights and specifically asked counsel for the Respondents at oral argument in the present

case if the failure to reverse the trial court would set up separate classifications of persons. The two classifications would be (1) those children with legal parents who were eligible to be virtually adopted and (2) those children who had no legal parents and were not eligible for virtual adoption. The response from counsel admitted that it did establish two categories of persons.

Most of the states require some showing of an agreement between the natural and adoptive parents as a requirement for virtual adoption. After this argument is established, there are performance requirements by the natural parents in giving up custody and performance by the child by living in the home of the adoptive parents. These performance requirements were proved at the trial in the present case to the point that Respondents' counsel objected to the evidence as being so overwhelming that it was cumulative.

The trial court made it abundantly clear that all of the requirements of virtual adoption had been satisfied except the agreement requirement. As to this requirement, the trial court held that there was only one reason that compelled the court to rule that the Petitioners could not be virtually adopted: there was no Georgia authority that a juvenile court can stand *In Loco Parentis* for natural parents and contract with the adoptive parents. The trial court's comments were: "I think, under those circumstances, assuming that they (the Petitioners) had the authority to enter into such a contract, that this court would be persuaded that there was clear, convincing and strong evidence of the existence of such contract".

To the Petitioners' knowledge, all legal articles indicate that the most important prerequisite to establishing

virtual adoption is proof that a contract of adoption was entered into between the foster parent and the child's natural parent or some individual or institution standing *In Loco Parentis*. George A. Locke, J.D. *Modern Status Of Law As To Equitable Adoption Or Adoption By Estoppel*, 97 A.L.R. 3d 347, § 2. To be valid, an agreement to adopt must be made by parties who are competent to contract; therefore, the individual contracting with the foster parent must be one who is authorized to enter into an agreement with respect to the child in question. *Ibid.*

There has never been a case decided by the Georgia Supreme Court in which an agreement between the foster parents and a person or institution standing *In Loco Parentis* with the natural parents was considered until the present case. In a case of first impression, the Supreme Court of Georgia should have followed the holdings of courts of sister states and applied the doctrine of *In Loco Parentis* to avoid denying the Petitioners to equal protection of the law. *Nationwide Mutual Fire Ins. Co. v. Tomlin*, 181 Ga. App. 413 (1986)

The definition of the Latin phrase "*In Loco Parentis*" from Black's Law Dictionary is:

> In the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities. *Wetherby v. Dixon*, 19 Ves. 412; *Brinkerlioff v. Merselis*, 24 N.J.L. 683; *Howard v. United States, D.C. Ky.*, 2 F.2d 170, 174; *Meisner v. United States, D.C. Mo.*, 295 F. 866, 868.

In Loco Parentis agreements in virtual adoption cases have been upheld in most of the states of the United States. Just a few examples are:

- *Malone v. Dixon*, 410 S.W.2d 278 (Tex. Civ. App. Eastland 1966, writ ref., n.r.e.) the agreement was made with the superintendent and agent of the Texas Children's Home.

- *Hilt v. Hooper,* 203 S.W.2d 334 (Tex. Civ. App. Galveston 1947), the adoptive parents agreed with the County Judge that they would adopt the child.

- *Cheney v. Coffey,* 131 Tex. 212, 113 S.W.2d 162 (1938), the District Court Judge placed them with the Cheneys on their agreement to take them permanently.

- *Benefield v. Faulkner,* 248 Ala. 615, 29 So.2d 1 (1947), a written contract of adoption was entered into between foster parents and an orphanage which had parental custody of a child.

- *Ruenbuhl v. Holland,* 250 S.W.2d 455 (1952, Tex. Civ. App.), the decedent and her husband entered into a contract with a child and his older brother who was then vested with legal custody of and control over the child.

- *Rodriguez v. Morris,* 136 Misc. 2d 103, 519 N.Y.S.2d 451 (1987), the decedent had entered into an agreement with an institution having care and custody of the children.

Georgia does recognize *In Loco Parentis* in other areas of the law and should have applied this law to this case to prevent an Equal Protection violation. At the time of the juvenile court orders concerning Petitioners, Georgia law stated:

> (3) When conditions and circumstances warrant the termination of parental rights, the court may take custody of the child or children involved for suitable placement or adoption and may act in loco parentis in all matters pertaining to their interests. In such cases the court shall act as guardian of the person and property of the child or children involved. (Georgia Laws 1951, page 304 which was in effect in 1964 and 1965)

The term *"Loco Parentis"* is listed sixty times in the current code of Georgia. Particularly, *O.C.G.A.* § 15-11-111 defines an unemancipated minor as any person under the age of 18 who is not or has not been married or who is under the care, custody, and control of such person's parent or parents, guardian, person standing in loco parentis, or the juvenile court of competent jurisdiction. (Code 1981, 15-11-111, enacted by Ga. L. 1987, p. 1013, 2; Ga. L. 1988, p. 661, 1.)

Although the decision by the Georgia Supreme Court is in conflict with all other decisions from other states, it is also in conflict with its own decision dating back to the 19th century. In *Cleghorn v. Janes*, 68 Ga. 87 (1881) the court held that "we have equated those *In Loco Parentis* with parents."

Although the Supreme Court of Georgia had never decided a case that would stand for the proposition that a juvenile court can stand *In Loco Parentis* for natural parents and contract with the adoptive parents, the Court of Appeals of Georgia has answered the similar question of whether the natural parents must consent to an adoption if the juvenile court has obtained legal and permanent custody of the child. *Criswell v. Jones*, 60 Ga. App. 81, (5) 3 S.E.2d 115 (1939). The *Criswell* case answered this question by not requiring the consent of the natural parent, and Georgia case law has now recognized the authority of the juvenile courts to give consent to adoption without the consent of the natural parents.

Criswell was cited in the majority opinion of the Supreme Court of Georgia in the present case at footnote

one on page three. See Appendix I. Ironically, *Criswell* was cited as well in the strong dissent of three of seven justices of the Supreme Court of Georgia in this case. Justice Carley found that the majority's decision was an " . . . unwarranted and inordinately fine distinction to hold that a party has authority to consent to an adoption but is not competent to contract for that adoption."

II. This Classification Discriminates Against Children With No Parents

This court should grant certiorari to answer this basic question: Should a child with no legal parents in Georgia have the same civil rights as a child with legal parents? The Supreme Court of Georgia has allowed discrimination and this discrimination is not substantially related to any important government objective and is in direct conflict with the United States Constitution. Specifically, there has been a denial of equal protection of the laws within the meaning of the Fourteenth Amendment[5] by creating a classification which is not subject to virtual adoption whereas children with legal parents may be virtually adopted.

Discrimination against a child without natural parents has much in common with discriminatory laws based on illegitimacy, ancestry, and racial origins which

---

[5] The decision of the Georgia Supreme Court is of importance in determining rights on the federal law, since the federal courts generally follow the definition of the state in which the case was presented in determining what is a "child" within the federal law in question. See the note *Rights of Illegitimates Under Federal Statutes*, 76 Harv. L. Rev. 337 (1962).

have long since been struck down as constitutionally impermissible. For instance, it has been held that illegitimate children should be considered as included within the definition of "children." See *Yellow Cab Co. v. Industrial Com.*, 42 Ill. 2d 226, 247 N.E.2d 601 (1969).

To Petitioners' knowledge, there is no case in any state which recognizes virtual adoption and allows children with natural parents to contract to adopt, yet denies the equal protection of the law to those children who have no natural parents. The simple reason is that these children must rely on a person who stands *In Loco Parentis* for their biological parents. Justice Carley recognized this in his dissent to the majority opinion of the Supreme Court of Georgia in this case. As partially cited above, he stated that in view of the *Criswell v. Jones* decision in 1939: "It is an unwarranted and inordinately fine distinction to hold that a party has authority to consent to an adoption but is not competent to contract for that adoption." Justice Sears also dissented in this case, incorporating by reference her dissent in *O'Neal*. She also articulated that even in view of the majority in *O'Neal* the present case should be reversed. In Justice Sears' dissent in O'Neal she set out the purpose of equity: "[I] would hold that where a child has fully performed the alleged contract over the course of many years or a lifetime and can sufficiently establish the existence of the contract to adopt, equity should enforce the contract over the objection of the adopting parents' heirs that the contract is unenforceable because the person who consented to the adoption did not have the legal authority to do so."

To Petitioners' knowledge, there is no similar case in any state. However, the present case is a natural extension of the

long line of cases which examine the rights of a child that has no legitimate father. The only difference in this case is the additional problem of the child having no legal mother.

Many children, such as the Petitioners, have been left with no parents because of court action, vis-a'-vis, termination of parental rights. Had either one of Petitioners' natural parents contracted with Mr. and Mrs. Welch as Judge Hardin of the Juvenile Court of Richmond County did, they would be declared by the trial court as virtually adopted today. Yet, through no fault of their own, the Juvenile Court of Richmond County terminated their biological parents' rights and now they are left with even less rights than bastards.

In order to avoid a violation of the Equal Protection guaranties of the Fourteenth Amendment, this Court has ruled in multitudinous cases that a valid classification must rest upon material differences between the persons, activities, or things included in it and those excluded. Under these principles, a decision which attempts to make illegitimacy, or its logical extension of no natural parents, a basis for a valid classification would constitute a denial of equal protection.[6]

Violation of equal protection by classifications based on illegitimate status did not receive serious consideration from the courts until 1968 when this Court decided the landmark cases of *Levy v. Louisiana*, 391 U.S. 68, 20

---

[6] Irwin J. Schiffres, J.D., *Discrimination On Basis Of Illegitimacy As Denial Of Constitutional Rights*, 38 A.L.R. 3d 613 § 1 (1994).

L.Ed.2d 436, 88 S.Ct. 1509, *reh. den.*, 393 U.S. 898, 21 L.Ed.2d 185, 89 S.Ct. 65 (1968), and *Glona v. American Guarantee & Liability Ins. Co.*, 391 U.S. 73, 20 L.Ed.2d 441, 88 S.Ct. 1515, *reh. den.*, 393 U.S. 898, 21 L.Ed.2d 185, 89 S.Ct. 66 (1968). *Levy* held that it was a violation of the Equal Protection Clause of the Fourteenth Amendment to deny illegitimate children the right to maintain an action for their mother's wrongful death. Similarly, *Glona* held that it was a violation to deny a mother the right to recover for the wrongful death of her illegitimate children.[7]

Fortunately, for persons who find themselves in the minority in this country, the courts do not consider the amount of discrimination, only whether there is evidence of any discrimination. *United States v. Clark*, 445 U.S. 23, 63 L.Ed.2d 171, 100 S.Ct. 895 (1980). *Levy* points out that illegitimate children are humans, they are not "nonpersons," and therefore they are clearly persons within the meaning of the provision of the Fourteenth Amendment and that no state shall deny to any "person" within its jurisdiction the equal protection of the laws. Are Petitioners any less "persons" than bastards? Are they not afforded the same rights as the child in *Levy* or the mother in *Glona?*

---

[7] *Id.* § 2

In *Clark v. Jeter*, 486 U.S. 456, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988) the United States Supreme Court followed the standard established by *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175, 92 S.Ct. 1400, 1406, 31 L.Ed.2d 768 (1972) that classifications which distinguish between legitimate and illegitimate children must withstand intermediate scrutiny by being substantially related to an important governmental objective. Applying that standard, the U.S. Supreme Court struck down a six-year statute of limitations for paternity actions under Pennsylvania law.

The *Clark v. Jeter* decision followed a series of rulings in which the United States Supreme Court applied the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States to strike down statutes which invidiously discriminated against illegitimate children. In *Gomez v. Perez*, 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56 (1973) the U.S. Supreme Court followed previous cases by holding:

> Under these decisions, a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded to children generally. We therefore hold that once a State posits a judicially enforceable right on behalf of children to needed support from their natural fathers there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a State to do so is *"illogical and unjust."* (Emphasis added).

Id. at 93 S.Ct. 872, 875, citing *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175, 92 S.Ct. 1400, 1406, 31 L.E.2d 768 (1972). As a result, the U.S. Supreme Court in *Gomez*

struck down the order of the Texas trial judge denying support to an illegitimate child.

An interesting analogy between *Gomez* and the present case is that during oral arguments before the Texas Supreme Court counsel conceded that but for the fact that the child was illegitimate she would have been entitled to support under the laws of Texas. This is identical to the statement of counsel for the Respondents when he conceded before the Georgia Supreme Court that if a legal parent had contracted with Mr. or Mrs. Welch rather than Judge Hardin of the Juvenile Court of Richmond County, the Petitioners should have been virtually adopted.

In *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977), the United States Supreme Court found that a classification in the Illinois Probate Act which allowed children born out of wedlock to inherit by intestate succession only from their mothers, denied equal protection of the laws. The statute had provided that children born in wedlock may inherit by intestate succession from both their mothers and their fathers. The United States Supreme Court found that the classification did not even bear some rational relationship to any legitimate state purpose.

By review of the cases cited above, it is clear that classifications based upon the illegitimate status of a child must survive a heightened scrutiny under the analysis of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States of America. The Court has noted that children born out of wedlock have been historically the targets of invidious

discrimination based solely upon their status at birth, which is illogical and unjust. Pursuant to this line of cases, the classification status by Georgia law which denies a child with no legal parents the right to inherit the estate of the persons that raised him or her must be substantially related to an important governmental objection. If it is not so related, then it is simply a denial of Equal Protection under the Fourteenth Amendment of the Constitution of the United States of America.

Another example of the myriad of cases that have received vigilant and rigid scrutiny are cases in which race is a factor in adoptions.[8] Also, the courts of this country have consistently held that distinctions between citizens solely because of their ancestry are odious to a free people whose institutions are founded upon the doctrine of equality, and were subjected to the most rigid scrutiny. *Brown v. Board of Education*, 347 U.S. 483, 98 L. Ed. 873, 74 S.Ct. 686, 38 A.L.R. 2d 1180, Supp. Op. 349 U.S. 294, 99 L.Ed. 1083, 75 S.Ct. 753 (1954).

The Petitioners were placed into a minority in Georgia since they had no parents to contract with the Welches to complete their adoption formally. It is illogical and unjust to penalize the Petitioners for this status which is theirs through no fault of their own. By doing so, Georgia law has illogically and unjustly penalized Petitioners for the actions of their natural parents and the inactions of those "parents" who raised them.

---

[8] Jay M. Zitter, J.D., *Race As Factor In Adoption Proceedings*, 34 A.L.R. 4th 167 (1994).

All children in Georgia should be allowed to be virtually adopted, regardless of whether their natural parents' parental rights have been terminated or if they have natural parents. By holding that the juvenile court does not have the authority to stand in Loco Parentis for the Petitioners to complete a contract of virtual adoption, the Georgia Supreme Court is denying Petitioners, as well as others that are similarily situated, equal protection of the law, with no basis, rational or otherwise.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for Writ of Certiorari.

Respectfully submitted,

MICHAEL WEINSTOCK
Ga. Bar No. 746454
Suite 300
3405 Piedmont Road, N.E.
Atlanta, Georgia 30305
(404) 231-3999
Counsel for Petitioners

ROBERT P. MCFARLAND
Ga. Bar No. 491250
Cumming, Georgia 30130
(404) 889-2522
Attorney for Petitioners

APPENDIX I

In the Supreme Court of Georgia

Decided: FEB 13 1995

S94A1722, S94X1725, S94X1728, S94X1730, S94X1732.
WELCH et al. v. WELCH et al. (and vice versa).

BENHAM, Presiding Justice.

In the 1960's, appellant-plaintiffs were placed into the custody of Mr. and Mrs. Cecil Welch by order of the juvenile court. Although appellants remained in the custody of the Welches until they reached their majority, the Welches never initiated proceedings to adopt appellants formally. When no wills were offered for probate after the Welches died in 1992, appellants filed an action seeking children's shares of the estates based on alleged "virtual adoption." After appellants presented their evidence at a bench trial, the trial court granted appellees' motion for involuntary dismissal. The ground for the dismissal was the trial court's conclusion, as a matter of law, that a contract for adoption must be between the natural parents and the adoptive parents, and that case law did not support the conclusion that the juvenile court was a party competent to enter into such a contract. It is from that dismissal that appellant bring the main appeal. Appellees have filed defensive cross-appeals.

In *O'Neal v. Wilkes*, 263 Ga. 850 (1) (439 SE2d 490) (1994), this court reiterated the principle that a contract for adoption must be between parties competent to contract for the disposition of the child. The question for resolution in this case is whether the juvenile court can, by entry of an order awarding custody, become one of

such parties. We conclude that the principles stated in *O'Neal* should not be extended so far as to permit the juvenile court such authority.

Virtual adoption is not a doctrine to be employed broadly, and the facts of this case demonstrate why. Appellants' suit asked the trial court to create a contract out of an order which merely established legal custody and gave approval to the custodians to proceed with statutory adoption proceedings if they chose to do so. The evidence is clear that they did not choose to do so, and while the record is silent as to the reason for that non-action, it is also silent as to the intent of the Welches in taking custody of appellants. The trial court here expressed the opinion that the contract of adoption must be considered oral because only the juvenile court signed the order and the purported adoptive parents had not signed anything memorializing their intent at that time of adopting appellants. The danger of familial ties being created by judicial action such as this in the absence of evidence of such an intent is too great to permit a custody order to have the effect which appellants would have us give it. The Welches are no longer able to speak to their reasons for not following up on the pre-approval given by the juvenile court, and we cannot assume from their silence that had such an intent to adopt that a court of equity should cause that intent to mature into an accomplished adoption.

While it is true that our former law permitted certain juvenile courts to take custody of children whose parents' parental rights had been terminated, and to act in loco

parentis and as guardian of such children[1] and case law has recognized the authority of such courts to give consent to adoption[2] that authority should properly be limited to the context in which it arose, statutory adoption. The trial court in the present case was correct in its holding that there was no case law permitting a juvenile court's order to be considered the contract underlying virtual adoption.

The courts have an important role in supervising and regulating the adoption process in this case and should not become mere contractual parties in the process. While it is appropriate in circumstances such as those surrounding the custodial placement of appellants for the juvenile court to give encouragement to custodians to adopt, it is not appropriate for the superior court subsequently to transmute that encouragement into a contract which became binding on one side only after the death of that side. The trial court was correct in ruling that the custody order could not serve as a contract of adoption and in granting appellees' motion for involuntary dismissal. Since that judgment is affirmed, the defensive cross-appeals are moot and must be dismissed.

Judgment affirmed in Case No. S94A1722. Appeals dismissed in Cases No. S94X1725, S94X1728, S94X1730, and S94X1732. All the Justices concur except Sears, Hunstein, and Carley, who dissent.

---

[1] Ca. L. 1951, pp. 291, 304, S 21 (3).

[2] *Criswell v. Jones*, 60 Ga. App. 81 (4) (3 SE2d 115) (1939).

S94A1722, S94X1725, S94X1728, S94X1730, S94X1732.

WELCH et al. v. WELCH et al. (and vice versa).

CARLEY, Justice, dissenting.

Because, in affirming the trial court, the majority unduly restricts the principles of *O'Neal v. Wilkes*, 263 Ga. 850 (1) (439 SE2d 490) (1994) and misconstrues the custody orders, I must respectfully dissent. In my opinion, the trial court erred in granting appellee's motion for involuntary dismissal pursuant to OCGA S 9-11-41 (b).

1. In a virtual adoption case, a contract for adoption must be proven and "[t]he first-essential of a contract for adoption is that it be made between persons *competent to contract* for the disposition of the child. [Cits.]" (Emphasis supplied.) *O'Neal v. Wilkes*, 263 Ga. 850, 851 (1) (439 SE2d 490) (1994). Ordinarily, the natural parents will be the ones who are "competent to contract" for the adoption of their child. However, that is not invariably the case. The natural parents may be deceased or, if living, they may have lost their parental rights. Accordingly, in determining whether this element of a virtual adoption case has been proven, the focus must be upon the competency of the party with whom the purported adoptive parents contracted. That party's lack of status as a natural parent of the child is not necessarily dispositive.

At the time that appellants were placed into the custody of the Welches, the applicable former law provided that,

> [w]hen conditions and circumstances warrant the *termination of parental rights*, the [juvenile] court may take custody of the child or children involved for suitable placement or adoption and

> may act in loco parentis in all matters pertaining to their interests. In such cases the court shall act as guardian of the person and property of the child or children involved. (Emphasis supplied.)

Ga. L. 1951, pp. 291, 304, § 21 (3). Thus, where parental rights had been terminated, a juvenile court could consent to an adoption "in lieu of the consent of the parent[s]." *Criswell v. Jones*, 60 Ga. App. 81, 82 (4) (3 SE2d 115) (1939). I cannot agree with the majority's position that the authority possessed by the juvenile court at the time of the custody orders was limited to statutory adoption. It is an unwarranted and inordinately fine distinction to hold that a party has authority to consent to an adoption but is not competent to contract for that adoption.

Accordingly, I believe that, under the law applicable at the time of the custody orders involved in this proceeding, it was possible for a child whose natural parents had lost their parental rights to become virtually adopted as a consequence of an adoption agreement between a juvenile court and the purported adoptive parents. I do not hereby advocate an expansion of the existing law of virtual adoption, but, to the contrary, merely recognize and apply the long-standing principle that the party with whom the purported adoptive parents contracted must be one who was competent to contract for the disposition of the child. *O'Neal v. Wilkes*, supra at 851 (1). Under the applicable provisions of former law, a juvenile court would be competent to contract with the Welches for appellants' adoption if the parental rights of their natural parents had been terminated. Therefore, in my opinion,

the trial court incorrectly concluded that appellants could not recover on their virtual adoption claims in the absence of a contract between their natural parents and the Welches and, thus, erred in granting appellees' § 41 (b) motion for involuntary dismissal.

2. The majority not only concludes that the juvenile court could not become a party competent to contract for the disposition of appellants, but also questions the existence of any intent to adopt on the part of the Welches.

The trial court found that, if the juvenile court was competent to contract with the Welches for the adoption of appellants, then the language of the custody orders constituted, in a clear, convincing and strong manner, a contract for adoption. In my opinion, this finding is not erroneous. Both custody orders clearly state that appellants were being placed with the Welches *for the purpose of adoption*.

> It is true that, in order to be enforceable under the doctrine of virtual adoption, the contract must comprehend and intend a legal adoption according to statute. [Cit.] This, however, is not to say that language clearly having that meaning under the attendant and surrounding circumstances, though not containing precise legal phraseology, would be insufficient. (Emphasis supplied.)

Toler v. Goodin, 200 Ga. 527, 539 (4) (37 SE2d 609) (1946). See also *Anderson v. Maddox*, 257 Ga. 478 (360 SE2d 590) (1987). Furthermore, because the Welches accepted and retained custody appellants pursuant to the custody orders, the absence of any document signed by them is

immaterial. *Taylor v. Taylor*, 217 Ga. 20, 22-23 (2) (120 SE2d 874) (1961).

3. The trial court's grant of an involuntary dismissal cannot be affirmed on the ground that appellants failed to prove that the Welches died intestate. The fact that no wills have ever been propounded is sufficient to show that the Welches died intestate and to shift to appellees the burden of coming forward with some evidence to authorize a finding that the Welches had wills.

The judgment of the trial court should be reversed.

I am authorized to state that Justice Hunstein joins in this dissent.

S94A1722. WELCH et al. v. WELCH et al.

SEARS, Justice, dissenting.

For the reasons given by Justice Carley in his dissent, I believe that the trial court's judgment must be reversed even under the rationale of the majority opinion in *O'Neal v. Wilkes*, 263 Ga. 850 (1) (439 SE2d 490) (1994), to which I dissented. I also believe that the judgment in this case should be reversed based on the principles set forth in my dissent in *O'Neal v. Wilkes*, 263 Ga. at 853-856. I therefore respectfully dissent to the majority opinion in the present case.

APPENDIX II

SUPREME COURT OF GEORGIA

Case No. S94A1722 Atlanta, March 3, 1995

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

JOSEPH EUGENE WELCH ET AL. V. MACK WREN WELCH, ADMR., ET A

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

All the Justices concur, except Sears, Hunstein and Carley, JJ., dissent.

SUPREME COURT OF THE
STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ Sherie M. Welch, Clerk.

APPENDIX III

IN THE SUPERIOR COURT OF FORSYTH COUNTY
STATE OF GEORGIA

IN RE: THE ESTATE OF ELWYN GLORE WELCH and
THE ESTATE OF CECIL S. WELCH

JOSEPH EUGENE WELCH,
JERRY CECIL WELCH, LARRY CECIL WELCH
and JENNY R. PRESSEL as alleged
children of CECIL S. WELCH and
ELWYN GLORE WELCH

Plaintiffs

vs. CIVIL ACTION FILE

MACK WREN WELCH as Administrator of the Estate of CECIL S. WELCH and
CHARLES A. WELCH, MARION COCHRAN
a/k/a MARION WELCH COCHRAN and
MARTHA RAY SINGLETARY, Administrators of
the Estate of ELWYN GLORE WELCH and
THOMAS WOODROW WELCH

NO. 92-21,934
92-23,103

Defendants

ORDER AND JUDGMENT

This matter came on for trial before the Court sitting without a jury, both sides having expressly waived their respective rights to a jury. Plaintiffs have presented their evidence as to virtual adoption. Defendant Mack Wren Welch as administrator of the estate of Cecil S. Welch, has presented no evidence and has rested. Defendants Charles A. Welch, Marion Cochran a/k/a Marion Welch Cochran and Martha Ray Singletary as co-administrators of the estate of Elwyn Glore Welch and Thomas Woodrow

Welch have moved for directed verdicts at the close of plaintiffs' evidence, which the Court considers as motions for involuntary dismissal pursuant to O.C.G.A. § 9-11-41(b) and *Chamlee v. DOT*, 182 Ga. App. 120 (1987).

The Court must now determine whether plaintiffs have presented evidence which, standing alone and without further evidence by the defendants, both as a matter of law and as a matter of fact, would authorize judgment in favor of plaintiffs in this case. If plaintiffs have not presented such evidence, then the Court must grant defendants' motions and render a verdict in favor of defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jenny Pressel and Jerry Welch

With respect to Jenny Pressel and Jerry Welch, their natural father, Frank Slaton, is alive and testified in this case. He denied ever agreeing to allow Cecil and Elwyn Welch to adopt his children. In fact, the evidence shows he filed a Petition for Writ of Habeas Corpus at one point, seeking to have James Welch (Elwyn's only natural child and Jenny and Jerry's stepfather) and Elwyn Welch return his children to him when his ex-wife, the children's mother, died. There is no direct evidence that Frank Slaton ever entered into an agreement with Cecil and Elwyn Welch, the object of which was for the Welchs to adopt Jenny Pressel and Jerry Welch.

Jenny Pressel and Jerry Welch, nevertheless, ask this Court to infer the existence of an agreement of virtual adoption from the evidence that has been presented. That evidence is that they lived with Cecil and Elwyn Welch

for long periods of time, that Frank Slaton acquiesced in their living arrangements with the Welchs and did not prosecute the Writ of Habeas Corpus to any conclusion, and that they continued to live with Cecil and Elwyn Welch after the Writ of Habeas Corpus was dismissed for want of prosecution.

Under the standard of proof applicable in this case, this Court does not consider the evidence presented to clearly, strongly and satisfactorily show an agreement between Frank Slaton and Cecil and Elwyn Welch, the object of which was for Cecil and Elwyn Welch to adopt Jenny Pressel and Jerry Welch, which leaves reasonable doubt as to the existence of the agreement. *Lee v. Gurley*, 260 Ga. 23 (1990). Therefore, Jenny Pressel and Jerry Welch have simply failed to satisfy their burden of proof that they were virtually adopted, leaving this Court no other option but to grant defendants' motion for judgment of involuntary dismissal and to render a verdict in favor of defendants that Jenny Pressel and Jerry Welch are not the virtually adopted children of Cecil and Elwyn Welch.

Joseph Welch and Larry Welch

Regarding Joseph Eugene Sidler, n/k/a Joseph Samuel Welch and Larry Jo Pennington, n/k/a Larry Cecil Welch, there was no attempt to show that their natural parents entered into an agreement of adoption with Cecil and Elwyn Welch. The Court has focused on that particular element because any cause of action alleging virtual adoption must clear that initial hurdle before a Court even considers the other elements of virtual adoption.

Because the Court believes that the presence of an agreement between the natural parents and adoptive parents is necessary under Georgia law, *Lee v. Gurley, supra.*, there can be no virtual adoption without such an agreement.

Joseph and Larry Welch have contended that a virtual adoption should be declared based on an agreement between the Juvenile Court of Richmond County, Georgia, and Cecil and Elwyn Welch. They have presented orders from that Court which were admitted over objection by this Court for purposes of showing the existence of such an agreement.

The Court notes that case law dealing with virtual adoption speaks in terms of oral contracts. This Court considers the contract that is proposed as a basis for virtual adoption here to be partially written and partially oral. While the orders of the Juvenile Court of Richmond County, in the case of Larry, are signed by a judge, and, in the case of Joseph, were contemporaneously certified to have been executed by a judge, there are no signatures by Cecil and Elwyn Welch which would, in effect, constitute a written contract between the Juvenile Court of Richmond County and Cecil and Elwyn Welch. In view of those facts the Court considers the contracts offered as a basis for virtual adoption to be oral contracts.

The orders of the Juvenile Court of Richmond County were entered and reflect, more so with regard to Larry and Joseph, the circumstances under which Joseph and Larry came to Cecil and Elwyn Welch. Defendant do not dispute that the parental rights of the natural parents of Larry were terminated prior to the transfer of custody of Joseph and Larry to Cecil and Elwyn Welch. There is no

evidence in the record reflecting what happened to the parental rights of the natural parents of Joseph. There is no evidence that Joseph's natural parents' rights were terminated, nor is there any evidence reflecting that they were not terminated.

Plaintiffs contend that the Juvenile Court, at the time that it signed the orders that were entered into evidence in this case, stood *in loco parentis* to the children, Joseph and Larry, and was, therefore, in a position to contract with Cecil and Elwyn Welch for the purpose of Cecil and Elwyn Welch adopting Joseph and Larry.

A review of the orders that have been admitted into evidence shows that the orders clearly contemplate placement of the children, Joseph and Larry, with the Welchs for purposes of the Welchs filing an adoption petition with the appropriate superior court for this State. That, of course, was never done, and it was not contended that it was done. There is no evidence to indicate that a petition for adoption has ever been filed by Cecil and Elwyn Welch to adopt Joseph or Larry.

There are no cases in Georgia which suggest that a virtual adoption can be based on an agreement between a juvenile court and the alleged adoptive parents. Virtual adoption is a creature of case law. It is not something that has been established by statute and this Court is bound by the case law governing virtual adoption. In the absence of any Georgia case law authorizing a virtual adoption based on an agreement between the juvenile court standing *in loco parentis*, assuming that the Juvenile Court stood *in loco parentis* to these children at the time that the Court took them into its custody, this Court has

no authority to declare a virtual adoption under the evidence presented in this case concerning Joseph and Larry.

The Court is mindful of much of the other evidence that was presented in this case. Like the Court in *Chambers v. Chambers*, 260 Ga. 610 (1990), which plaintiffs contend indicates a trend toward virtual adoption based upon elements which would not include the existence of contract, the Court recognizes that plaintiffs in this case lived in a parent and child relationship with Cecil and Elwyn Welch beginning early on in their lives. But, as was pointed out in *Chambers*, the existence of any sympathy that the Court might have does not control the ruling that the Court must make in this case based on the state of the case law in Georgia at this time. As pointed out in *Chambers*, under current Georgia case law, plaintiffs have not made out a case for virtual adoption, and it is for the appellate courts to decide whether virtual adoption should be expanded to encompass the circumstances presented in this case. Until such time as those courts so rule, this Court does not believe it is in a position to declare a virtual adoption based upon an agreement between a juvenile court and adoptive parents.

For the reasons stated this Court grants defendants' motion for a judgment of involuntary dismissal as to plaintiffs on the basis that, under the evidence presented in this case, the plaintiffs are not entitled to recover, either as a matter of fact or as a matter of law. The Court also enters a verdict in favor of defendants against plaintiffs Joseph and Larry for the same reasons.

Intestacy

Defendants have requested an additional ruling from the Court stating that the plaintiffs have not proved the element of intestacy during their case, and, that, therefore, defendants' motion should be granted and a verdict entered upon that additional basis. Inasmuch as the Court has already indicated that a virtual adoption necessarily hinges upon the existence of an agreement between the natural parents and the alleged adoptive parents, in the absence of the existence of such an agreement any further decision on the part of the Court with respect to other elements is unnecessary and would constitute an advisory opinion. Therefore, the Court declines defendants' invitation to rule on the sufficiency of the evidence regarding intestacy.

Substantive Sufficiency of Juvenile Court Orders

Defendant Mack Wren Welch, who alone has rested his case, has also asked for a further finding by the Court that, in the event the appellate courts were to determine that a juvenile court in Georgia has the authority to enter into a virtual adoption contract, the Juvenile Court orders presented as evidence in this case do not constitute a contract of virtual adoption. Although the Court is reluctant to make a finding construing the substantive content of the Juvenile Court orders, because of the procedural circumstances of this case, that is, that certain defendants have moved for judgment of involuntary dismissal and have not yet rested their cases, and in the interest of judicial economy, the Court will make a finding regarding the substantive content of the Juvenile Court orders.

Upon the Court's review of the orders that were entered by the Juvenile Court of Richmond County, orders which were in the possession of Cecil and Elwyn Welch all these years, the Court believes that the language contained in those orders constitutes, in a clear, convincing and strong manner, to the point of being beyond a reasonable doubt, a contract for adoption, if the Juvenile Court had the authority to enter into such a contract. The orders constitute written declarations by the Juvenile Court, on one side, which were presented to the Welchs, on the other side, and which were abided by the Welchs, admittedly not completely because they did not bring a petition as contemplated by the order of the Juvenile Court of Richmond County. Under these circumstances, and at this stage of the proceedings, plaintiffs having rested, this Court is persuaded that there was clear, convincing and strong evidence of the existence of an adoption contract between the Juvenile Court of Richmond County and Cecil and Elwyn Welch with regard to Joseph and Larry, which evidence satisfies the burden of proof required in virtual adoption cases.

CONTINUATION OF PRIOR ORDERS

This Court's orders of March 12, 1993, as corrected on March 15, 1993, will remain in effect for thirty (30) days after the entry of this order.

JUDGMENT

Judgement is hereby entered in favor of defendants with costs assessed against plaintiffs.

ENTERED this 21 day of May, 1993.

/s/ Richard S. Gault
HONORABLE
RICHARD S. GAULT
Judge Superior Court

Presented by:

ROBERT S. STUBBS III
Attorney at Law
Georgia Bar No. 689820
Suite 200, 110 Old Buford Rd.
Cumming, Georgia 30130

JEFFREY BAGLEY
Attorney for Martha Singletary
Co-administrator of the Estate
of Elwyn Glore Welch
P. O. Box 244
Cumming, Georgia 30130

MICHAEL SLEISTER
Attorney for Mack Wren Welch
Administrator of the Estate of
Cecil Welch
112 North Main Street
Cumming, Georgia 30130

RUSSELL MCCLELLAND
Attorney for Tommy Welch
Forsyth Professional Bldg.
Suite 250, 110 Old Buford Rd.
Cumming, Georgia 30130

Seen:

ROBERT P. MCFARLAND
Attorney for Plaintiffs
252 Atlanta Road
Cumming, Georgia 30130

APPENDIX IV

STATE OF GEORGIA RICHMOND COUNTY.	)	IN THE JUVENILE
IN THE INTEREST OF:	)	COURT OF RICHMOND COUNTY,
LARRY JOE PENNINGTON Born: February 19, 1956	)	GEORGIA.

IT APPEARS TO THE COURT that on January 14, 1964, a divorce decree was granted to Thadieous Pennington against Ruth Ann Pennington, and in the decree of the Superior Court of Richmond Co. Ga. the order was passed, in part, as follows:

"It is hereby ordered, that the paremtal (sic) rights of the father and the mother, the plaintiff and the defendant in this case be, and they are forever divested, and the children are placed with the Juvenile Court of Richmond Co. Ga. for placement"; and,

"It further appears to the court that the "three minor children of the said plaintiff and defendant are in the custody of the Juvenile Court of Richmond Co. Ga., and that the father, who is the plaintiff in the divorce action is requesting that the parental rights of both parents be divested, and said children be placed with the Juvenile Court of Richmond Co. Ga. for adoption;"

"NOW, THEREFORE, IT IS ORDERED that the custody of the said Larry Joe Pennington be, and the same is this day given to the Juvenile Court of Richmond Co. Ga. for placement with foster parents for adoption;

ORDERED FURTHER, that the custody of the said child, Larry Joe Pennington be this day given to Cecil Samuel Welch and Elwyn Gloyd [sic] Welch, husband and

wife, and living together as such, and they shall have all legal right to petition the Superior Court of the County in which they live, to legally adopt the said child and to change his name to that of Welch in order that he might inherit any, or all, of their estates.

WITNESS: My hand as Judge this 16th day of January, 1964.

JOHN F. HARDIN
John F. Hardin, Judge Superior Court Richmond Co. Ga. Acting Judge Juvenile Court, Richmond Co. Ga.

Certified to be a true
and correct copy. This
16th day of Jan. 1964

/s/ EB Hamilton Clerk

APPENDIX V

STATE OF GEORGIA RICHMOND COUNTY. IN THE INTEREST OF: LARRY JOE PENNINGTON Born: February 19, 1956 In: Stuttgart, Germany	)	IN THE JUVENILE COURT OF RICHMOND COUNTY, GEORGIA.

IT APPEARS TO THE COURT that the above-named child was born in Stuttgart, Germany on the 19th day of February, 1956; and,

IT FURTHER APPEARS TO THE COURT that on January 14, 1964, a divorce decree was granted to the natural parents of the said child, and in the decree which was granted in the Superior Court of Richmond Co. Ga., the order was passed divesting the natural parents of all parental custody and control in and to this child, and the other children in his family, and the custody of all those children was given to the Juvenile Court of Richmond Co. Ga;

NOW, THEREFORE, it is ordered that the custody of the said Larry Joe Pennington be, and the same is this day given to Cecil Samuel Welch and Elwyn Gloyd Welch, husband and wife and living together as such and they shall have all legal right to petition the Superior Court in the County in Georgia in which they live to legally adopt the said child and to change his name to that of Welch in order that he might inherit any, or all of their estates, and the Juvenile Court of Richmond Co. Ga. waives all notice of such adoption and to the change of name; and the Richmond Co. Juvenile Court has the legal right to place

the said child with Mr. and Mrs. Welch because the Superior Court of Richmond Co. Ga. which is a major Court to the Juvenile Court did divest the natural parents of all parental rights in and to the said child Larry Joe Pennington and did give the full custody to the Juvenile Court of Richmond Co. Ga.

WITNESS my hand this 16th day of January, 1964,

JOHN F. HARDIN
John F. Hardin, Judge Superior Court Richmond Co. Ga. Acting Judge Juvenile Court Richmond Co. Ga.

Certified to be a true and
correct copy of the order.
This 16th day of Jan. 1964.

/s/ EB Hamilton Clerk

APPENDIX VI

STATE OF GEORGIA	)	
RICHMOND COUNTY.	)	
IN THE INTEREST OF:	)	IN THE JUVENILE COURT OF RICHMOND CO. GA.
JOSEPH EUGENE SIDLER Born: 9/3/58 In: Germany	)	

it APPEARS TO THE COURT that the above named chils (sic) is a neglected child and is in the custody of this Court, and the Court stands ready to place him for adoption; and,

IT FURTHER APPEARS TO THE COURT that Cecil Samuel Welch and Elwyn Gloyd Welch, husband and wife, and living together as such, have made application to this court to have the above named child placed with them for the purpose of adopting him,

IT IS HEREWITH ORDER, that the custody of Joseph Eugene Sidler be, and the same is this day given to the said Cecil Samuel Welch and Elwyn Gloyd Welch, husband and wife, and living together as such, and they shall have all legal right to petition the Superior Court in the County in which they live to legally adopt the said child and to change his name to that of Welch in order that he might inherit any, or all, of their estates; and the Richmond Co. Juvenile Court through its Judge, the Honorable John F. Hardin, waives all notice of such adoption and to the change of the said child's name.

WITNESS my hand this 2nd day of September, 1965.

JOHN F. HARDIN
John F. Hardin, Judge Superior Court Richmond Co. Ga. Acting Judge Juvenile Court R. Co. Ga.

Certified to be a true and correct copy. This 2nd day of September, 1965.

/s/ EB Hamilton Clerk